Reason for Granting the Writ

The decision below patently collides with this Court's ruling in *Procunier* v. *Atcheley* (400 U.S. 446).

In *Procunier* v. *Atcheley*, 400 U.S. 446 this Court specifically held that

> "Low intelligence, denial of the right to counsel, and failure to advise of the right to remain silent were *not in themselves coercive*. Rather they were relevant only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect." *Id.* at 453-454 (emphasis supplied).

The record in this case reveals that the *only* objections made at trial with respect to the admission of respondent's confession into evidence were that (a) respondent was not warned of his right to remain silent and (b) that he was 16 years old.

Since neither of these objections standing alone raises an issue of coercion requiring a *Jackson-Denno** hearing, under the pronouncement in *Procunier* v. *Atcheley*, *supra* it is clear that the decision below conflicts with the *Procunier* ruling.

Similarly, it is evident that under *Procunier* the issue of voluntariness was waived in the trial court and thus no *Jackson* v. *Denno* hearing was or is required. This is so because *no fact-issue* was raised at trial but simply a legal objection disposable without a hearing.

As just noted, the objections here as a matter of law, contrary to the Court's holding below did not raise the issue of voluntariness and as the record indispufably demonstrates no request was made by defense counsel to charge the jury on the issue of voluntariness.

---

* 378 U.S. 368.

Clearly defense counsel was aware that an objection at trial to a factual determination of the voluntariness of the confession was *not futile* even before *Jackson* v. *Denno*. That decision did not involve any change in the law with respect to the reception of a coerced confession into evidence. Rather, it has long been established by this Court that "convictions following the admission into evidence of confessions which are involuntary, i.e., the product of *coercion* either physical or psychological cannot stand." *Rogers* v. *Richmond*, 365 U.S. 534, 540.* See also *Chambers* v. *Florida*, 309 U.S. 227; *Lisenba* v. *California*, 314 U.S. 219, 236; *Rochin* v. *California*, 342 U.S. 165, 172-174; *Spano* v. *New York*, 360 U.S. 315, 320-321; *Blackburn* v. *Alabama*, 361 U.S. 199, 206-207—all these cited cases pre-date respondent's trial.

As the Court recently held in *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671 (2d Cir.):

> "Even though the only alternative open to defense counsel for challenging a confession in a pre-*Jackson* v. *Denno* trial in New York was the procedure subsequently declared unconstitutional, counsel certainly realized that he could have raised the voluntariness issue in one form or another at the state trial; and if he deliberately chose not to do so, then the *Jackson* v. *Denno* rule, even though retroactive, is inapplicable."

The record here accordingly reveals that the objections raised by respondent at trial to the introduction into evidence of his confession were directed at factors held by

---

*The minutes of respondent's application for a *Jackson* v. *Denno* hearing in the State Court demonstrate a critical concession by him that

> ". . . the record does not reveal that there is any claim by the defendant in this case that . . . the confession had been—coerced by means of force, or psychological trickery . . ."

this Court in *Procunier* to be not in themselves coercive. The Court below failed to take note even of the existence of *Procunier*. No coercive force was alleged by respondent (Compare *Delle Chiaie* v. *Picard*, 445 F. 2d 804, 805, n. 1 [1st Cir.]) for, as the record reveals, respondent on the trial did not challenge the testimony of the police officers relating to the circumstances attending his confession. The conclusion is inescapable that the order below granting respondent on his contentions a *Jackson* v. *Denno* hearing illustrates a clear disregard of the conditions precedent set forth in *Procunier* necessary for the holding of a *Jackson* v. *Denno* hearing and results therefore in a patent conflict with *Procunier* requiring resolution by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, N. Y., March 2, 1972.

Respectfully submitted.

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Petitioner

Samuel A. Hirshowitz
First Assistant Attorney General

Joel Lewittes
Assistant Attorney General
of Counsel

APPENDIX "A"

CR MO 223 MEMO 452

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 2614
36255

UNITED STATES OF AMERICA ex rel. JOSE BURGOS,

Petitioner,

—against—

HAROLD W. FOLLETTE, Warden, Green Haven State Prison, Stormville, N. Y.,

Respondent.

PALMIERI, J.

Petitioner, a New York State prisoner presently serving a sentence of life imprisonment at Green Haven Prison, Stormville, New York, seeks relief from detention by way of a writ of habeas corpus. Following his conviction after trial by jury of the crime of murder in the first degree, sentence was imposed on June 22, 1962, in the former Court of General Sessions, New York County. No appeal was taken from this judgment.

Petitioner, in 1965 and 1967, sought writs of error coram nobis in the Supreme Court, New York County. In these applications he claimed that his confession had been coerced by police, and he sought a hearing on the issue of voluntariness under *People* v. *Huntley*, 15 N.Y. 2d 72, 255 N.Y.S. 2d 838, 204 N.E. 2d 139 (1965). On both occasions the court denied the application after oral argument but with-

out holding a hearing, ruling that petitioner had failed to raise the issue at trial and thus was not entitled to a Huntley hearing. See *People* v. *McQueen*, 18 N.Y. 2d 337, 274 N.Y.S. 2d 886 (1966). The Appellate Division unanimously affirmed, 31 A.D. 2d 601, and leave to appeal to the New York Court of Appeals was denied on February 12, 1969.

In the instant petition, petitioner claims that the use of the allegedly coerced confession at trial and the failure of the state to provide a hearing at which the voluntariness issue could be adjudicated constituted denials of due process of law. In view of petitioner's inability to set forth any substantial support for his contentions, the petition must be dismissed.

Petitioner at the time of arrest was sixteen years old. He was born in Puerto Rico, and had come to New York about eight years earlier. He had attended school both in Puerto Rico and in New York, and apparently had the ability to speak and understand English well. Following a brutal shotgun assault of an elderly man in an elevator by four youths of Puerto Rican extraction, petitioner was taken into custody on May 30, 1961, about 7:30 p.m. More than 20 other youths were also picked up for questioning within a short period of time. The trial record indicates that petitioner was then questioned by a Detective Leonard for no more than two hours, and that he might have been interrogated intermittently by other officers before confessing to the crime around midnight. About 2:50 a.m. petitioner signed a 22-page question and answer statement detailing his part in the crime. This statement was introduced at trial against petitioner over defense objections relating to the petitioner's age and to the failure of police to advise him of his right to counsel.

Clearly, the use of an involuntary confession at trial constitutes a denial of due process. *E.g.*, *Jackson* v. *Denno*,

378 U.S. 368, 376 (1964). However, when the use of that confession is attacked by way of habeas corpus, it is incumbent upon the petitioner to allege specifically in what way the confession was involuntarily wrested from him. *United States ex rel. Homchak* v. *New York*, 323 F.2d 449 (2d Cir. 1963), *cert. denied* 376 U.S. 919 (1964). In the present case, petitioner simply asserts that he was questioned by "relays of policemen," that he had trouble with the English language, that he became confused, that he was denied the opportunity to telephone family or friends, and that he was threatened with denial of food and water. No further substantiation is offered. Additionally, petitioner did not challenge at trial the testimony of police officers relating to the circumstances attending petitioner's confession; this testimony shows there was no coercion or brutality by the police. Thus a federal hearing cannot be justified by unsupported and conclusory allegations. See *United States ex rel. Realmuto* v. *Wallack*, 254 F. Supp. 1006, 1009 (S.D.N.Y. 1966).

Two further matters merit discussion. Petitioner alludes, firstly, to a time lag of 7½ hours between his initial apprehension and the taking of his statement, and contends that such a delay would ipso facto render the statement void. The trial record shows, however, that the delay was reasonable. Total questioning by the detective in charge did not exceed two hours. There were four prime suspects, all of whom were interrogated, and numerous other youths were questioned on the crime before the petitioner's statement was taken. The Assistant District Attorney who formally took petitioner's confession, had just finished taking that of another participant, this accounting for almost two hours of the time petitioner was in custody. In short, the delay in this case was reasonable, and petitioner has failed to indicate any prejudice to him from the delay. Without such a showing of prejudice, there is no basis for

federal relief. *United States* v. *Ewell*, 383 U.S. 116 (1966); *United States ex rel. Von Cseh* v. *Fay*, 313 F.2d 620 (2d Cir. 1963); *United States ex rel. Chiarello* v. *Mancusi*, 288 F. Supp. 178 (S.D.N.Y. 1968).

Secondly, it is to be noted that petitioner, at the time he confessed, was sixteen years old, and was functionally bilingual. However, although age and language ability are important factors in judging voluntariness, standing alone the elements of minority and a foreign mother-tongue are not sufficient to warrant a hearing. Petitioner simply avers that during the questioning he became confused, but he does not claim that he did not know what was transpiring, or that he did not understand what the officers were asking him, or that the officers unfairly took advantage of his age and language ability to coerce him. Without a more substantial factual basis, a federal hearing is not in order. See *United States ex rel. Smith* v. *New Jersey*, 323 F.2d 146 (3d Cir. 1963), *cert. denied* 377 U.S. 1000 (1964).

Petition dismissed. It is so ordered.

Dated: New York, N. Y.
October 21, 1969

EDMUND L. PALMIERI
U. S. D. J.

Appendix "B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 794—September Term, 1970.

(Argued May 4, 1971 Decided September 3, 1971.)

Docket No. 34279

UNITED STATES OF AMERICA *ex rel.* JOSE BURGOS,

Petitioner-Appellant,

—v.—

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York 12582,

Respondent-Appellee.

Before:

LUMBARD, SMITH and KAUFMAN,

Circuit Judges.

Appeal from dismissal without hearing of petition of state prisoner for writ of habeas corpus, in the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*. Reversed and remanded for hearing.

MILTON J. SCHUBIN, New York, N. Y. (Kaye, Scholer, Fierman, Hays & Handler, New York, N. Y., Robert F. Fink, of counsel), *for Petitioner-Appellant.*

Appendix "B".

MORTIMER SATTLER, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for Respondent-Appellee.*

SMITH, *Circuit Judge*:

This is an appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, from the dismissal without a hearing of a petition for a writ of habeas corpus. We find error and remand for hearing.

Petitioner-appellant, Jose Burgos, was convicted in the former Court of General Sessions of New York County in May, 1962 of murder in the first degree and on June 22, 1962 was sentenced to life imprisonment upon the recommendation of the jury. No direct appeal was taken from the conviction.

In September, 1965 Burgos filed a writ of error *coram nobis* in the state courts and requested a *Huntley* hearing to determine the voluntariness of his confession which had been used against him at trial. That application was denied, as was a similar petition filed in 1968. Both were considered by the Appellate Division, First Department, and were likewise denied without opinion. [*People* v. *Burgos*, 31 A.D.2d 601, 295 N.Y.S.2d 407 (1968).] Leave to appeal to the New York Court of Appeals was denied on February 12, 1969. In June, 1969 this petition seeking a writ of habeas corpus was filed *pro se* in the District Court.

The crime for which the appellant was convicted was a particularly brutal one. Early on the evening of May 29, 1961, the appellant, who was then sixteen years of age, and

three companions followed two men into the elevator of an apartment house on New York's lower east side. One of the men alighted from the elevator leaving the four boys alone with the other, one Harry Heisler. The appellant then pulled out a rifle from inside his trousers, pointed it at Heisler and said "It's a hold-up." A struggle ensued and Heisler was shot in the abdomen with Burgos' gun. There was some dispute as to whether the shot was fired intentionally or accidentally. Heisler died at Bellevue Hospital later that night.

Shortly thereafter the police arrested a number of young men who lived in the neighborhood including the appellant. According to Burgos' petition, he was taken to the police station and questioned for some seven and one half hours by relays of detectives, he was told that he would be denied food and water until he made a statement, he was refused permission to contact his family, and he was not informed of his right to remain silent or of his right to counsel. In addition, the record discloses that he was only 16 years old at the time and spoke only broken English. He was attending a special school for "socially maladjusted and emotionally disturbed children." Although he was designated as being in the eighth grade, he read on a third grade level. A written statement was secured from the appellant by an assistant district attorney at 2:58 a.m. Interestingly, in spite of appellant's language difficulty, the statement was in all but impeccable English. This statement was later introduced over the objections of defense counsel at the trial.[1]

---

[1] The state contends that appellant's counsel was not sufficiently specific in objecting to the introduction of the confession since he did not use the term "voluntary" in raising his objections. The following colloquy took place at the trial:

(*footnote continued on following page*)

Appendix "B".

It is, of course, clear that had Burgos' trial taken place after October 10, 1966, the date of the Supreme Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the failure of the police to advise Burgos of his right to remain silent and to the presence of counsel would have been sufficient, by itself, to label his confession involuntary. *Miranda* was not, however, written on a blank slate. For many years the federal courts had examined the "totality of the circumstances" presented in each individual case where a claim of coercion was raised to determine whether due process standards were violated.[2] If we examine those pre-*Miranda* cases where the courts have found a defendant's confession to have been coereed, we note that several of the factors present here have been given significant weight in prior cases in reaching a finding of involuntariness. In *Haley*

Mr. Suarez: Your Honor, at this time I am going to object to any conversation between the lieutenant and Burgos unless we have indication here that the defendant was warned by the lieutenant that any statements that he would make would be used against him.

Mr. Loguen: Well, there is certainly no requirement of that by law, if your Honor pleases.

The Court: The objection is overruled.

Mr. Suarez: Well, your Honor, I have another objection to press on this. Now inasmuch as the defendant at the time of the commission of the alleged crime was a minor of the age of 16 and he was not aware of this state [sic], and inasmuch as a minor he could not enter into any contractual obligation or get married or do anything that an adult is permitted to do because of the interest that the state holds in mind, I feel that other precautions should have been used and carried out before extracting admissions from this defendant and friends or attorney or relative should have been present to advise the defendant prior to the making of any statement.

The Court: The objection is overruled.

To contend that there was an intentional waiver of the involuntariness claim merely because counsel failed to use the magic word "voluntary" is, in light of the above, mere sophistry.

[2] Cf. e.g. *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944); *Leyra* v. *Denno*, 347 U.S. 556 (1954).

v. *Ohio,* 332 U.S. 596 (1948) and more recently in *Gallegos* v. *Colorado,* 370 U.S. 49 (1962), we were instructed by the Supreme Court to take particular care when dealing with the confession of a youthful offender since it is much more likely that his will would be overborne by law enforcement officials.[3] The courts have also looked with strong disfavor on refusals to permit the accused to communicate with family or friends. [Cf. *Gallegos* v. *Nebraska,* 342 U.S. 55, 65 (1951); *Reck* v. *Pate,* 367 U.S. 433, 441 (1961).]. In *Haynes* v. *Washington,* 373 U.S. 503 (1963), the Court found that holding a defendant incommunicado until he made an incriminating statement was, by itself, sufficient to invalidate his confession.

> The petitioner at first resisted making a written statement and gave in only after consistent denials of his requests to call his wife, and the conditioning of such outside contact upon his assession to police demands. Confronted with the express threat of incommunicado detention and induced by the promise of communication with and access to family, Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment. 373 U.S. at 514.

---

[3] "He [the defendant] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admission. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights." 370 U.S. at 54-55.

Similarly, *Davis* v. *North Carolina*, 384 U.S. 737 (1966) and *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), reemphasized in denying retroactivity to *Miranda* that the absence of the *Miranda* warnings in pre-1966 convictions would nevertheless be a "significant factor in considering the volutariness of the statements later made." 384 U.S. at 740.[4]

As the appellant points out, the present case is factually quite similar to the situation presented to the Fourth Circuit sitting *en banc* in *Ledbetter* v. *Warden*, 368 F.2d 490 (1966), *cert. denied*, 386 U.S. 971 (1967). There the defendant was 19 years old and had completed the eighth grade. His first encounter with law enforcement officials was when he was arrested after having been implicated in a murder investigation. He was placed in a small room at the police station and was denied the opportunity to communicate with his family. He was not advised of his right to remain silent or to have the assistance of counsel. Later that evening, when confronted by the confession of a co-defendant, Ledbetter signed a written statement acknowledging his participation in the crime. The Court of Appeals noted:

> This youth was alone in the hands of the police, and his requests to contact his family were refused. He

---

[4] *Haynes* v. *Washington* (*supra*) at 510-511; *Culombe* v. *Connecticut*, 367 U.S. 568, 610 (1961); *Turner* v. *Pennsylvania*, 338 U.S. 62, 64 (1949); *Gallegos* v. *Colorado*, 370 U.S. 49, 54-55 (1966). In *Rogers* v. *Richmond*, 365 U.S. 534, 540-541 (1961) the Court noted: "Our decisions under [the Due Process Clause of the Fourteenth Amendment] have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is not so because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

was not told of his right to maintain silence; or that his statements might be used against him. And he was not informed of his right to an attorney. Considered against the background of Ledbetter's age and education we think the District Court correctly found that the confessions were not voluntarily given. 368 F.2d at 492.

If anything, the facts alleged in the present case are more egregious than those in *Ledbetter*. Here we are concened with a boy of 16 (not 19) who had also completed the eighth grade but read on a third grade level and spoke little English, who also asked to call his family and was refused, who additionally was denied food and water until he made a statement, who had his mother turned away, and who likewise was not advised of his constitutional rights. If these circumstances are established at a hearing, there is no doubt that the appellant's confession was fatally tainted.

We therefore remand the case to the District Court. If in the course of a hearing the appellant is able to substantiate his allegations as to the circumstances surrounding his interrogation and confession, then the writ should issue.

LUMBARD, *Circuit Judge:*

I dissent.

The record does not support the claim that objection was made at trial to the admission of the confesion on the ground that it was not voluntary. The record does show that no request was made to charge the jury on this subject.

Appendix "B".

Appellant was represented at trial by an experienced counsel, who had been assigned by the state courts to defend numerous cases of this nature. The reason for counsel's failure to make specific objection was because there was little or nothing to support any claim that the confession was involuntary.

Burgos was picked up with two of his confederates about 7:15 p.m. on the day following the killing of Harry Heisler on May 29, 1962. After a brief period of questioning, shortly after 8:00 p.m. when Lieutenant Owen asked Burgos "Did you do it?" Burgos responded "Well, I did it. I guess I'll get the chair." Invited to explain whether it was an accident, Burgos replied "It was no acident. A friend of mine needed money. We followed two men. I popped him on the elevator." Burgos then gave further details and said to another confederate, Hernandez, who had been brought into the room "tell them where the guns are." The guns were found within a few minutes, the questioning continued, and a few hours later after the arrival of an Assistant District Attorney the statement of appellant was taken down stenographically. While the detectives who testified to these events were cross-examined, counsel made no attempt to show that Burgos had been ill-treated or coereed in any way.

Contrary to the facts stated above, the petitioner now claims that "he was taken to the police station and questioned for seven and one half hours by relays of detectives, he was told that he would be denied food and water until he made a statement, he was refused permission to contact his family, and he was not informed of his right to remain silent or of his right to counsel."

On such a record, Judge Palmieri correctly denied the petition, without a hearing.

Appendix "B".

In view of the majority's emphasis on the claims of the petitioner, I think I should point out that they appear to have been drafted in the light of recent court opinions rather than on what was claimed or proven at the time of trial.

I would affirm the order of the district court.

APPENDIX "C"

34279

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES ex rel. JOSE BURGOS,

Relator-Appellant,

v.

HAROLD W. FOLLETTE, Warden, Green Haven Prison,

Respondent-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Denied.

December 13, 1971.

J. EDWARD LUMBARD
J. Edward Lumbard dissents

J. JOSEPH SMITH
J. Joseph Smith

IRVING R. KAUFMAN
Irving R. Kaufman
Circuit Judges